UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

LA SPECIALTY PRODUCE COMPANY and TEAMSTERS LOCAL 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	CASE 32-CA-207919

BRIEF OF RESPONDENT L.A. SPECIALTY PRODUCE CO. IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

Page

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LOS ANGELES, CALIFORNIA 90071-3147

TABLE OF AUTHORITIES

Page(s)

California Cases

Federal Cases

TABLE OF AUTHORITIES
Continued

Page(s)

California Statutes

Federal Statutes

Other Authorities

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), respondent L.A. Specialty Produce Co. ("Respondent," "LA Specialty" or the "Company") submits this Brief in support of its exceptions to Administrative Law Judge Amita Baman Tracy's Decision[1] in the above-captioned case.

INTRODUCTION

LA Specialty's exceptions challenge the ALJ's findings and conclusions of law that the Company's maintenance of its "Confidentiality & Non-Disclosure" and "Media Contact" policies violate Section 8(a)(1).

The policies are lawful on their face and do not refer to any protected activity under Section 8(a)(1). There is no evidence that these policies were promulgated for unlawful purposes. There is no evidence that the policies were ever enforced in an unlawful manner. There is no evidence that any statutory supervisor pointed to the "Confidentiality & Non-Disclosure" or "Media Contact" policy and told any employee that he or she could not engage in protected activity as a result of either policy. No employee was ever disciplined or suffered any adverse consequence under any of these policies. In fact, there is no evidence that any of the Company's 800 employees were affected by or ever felt inhibited by the policies.

LA Specialty excepts to the ALJ's findings and conclusions because, the ALJ misinterpreted and misapplied the Board's decision in Boeing Company, 365 NLRB No. 154 (2018) and applicable Board precedent, in finding maintenance of these policies violative of Section 8(a)(1).

The ALJ found a Section 8(a)(1) violation based on LA Specialty's maintenance of the "Confidentiality & Non-Disclosure" policy. Significantly, the ALJ made this finding even though the General Counsel agreed with LA Specialty that this policy was completely lawful under the Board's Boeing analysis. After the hearing and before the ALJ issued the Decision, the General Counsel moved to dismiss the Complaint's allegation that the "Confidentiality & Non-Disclosure" violated Section 8(a)(1). Instead of granting or even ruling on the General Counsel's

[1] The Administrative Law Judge's Decision will be referred to "ALJD" or "Decision" and the Administrative Law Judge will be referred to as "ALJ."

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motion, the ALJ simply ignored the motion and forged ahead with the finding that the "Confidentiality & Non-Disclosure" policy was unlawful under the Board's Boeing decision.

In concluding that the "Confidentiality & Non-Disclosure" policy and the "Media Contact" policy violated Section 8(a)(1), the ALJ misapplied the Board's Boeing decision. Contrary to the ALJ's findings, the policies did not prohibit Section 7 activity. Even if these policies potentially impacted employees' Section 7 rights, any effect on such rights was comparatively slight and outweighed by the legitimate business justification underlying each policy.

Additionally, as to the "Media Contact" policy, the ALJ failed to read the policy as a whole thereby ignoring well-established Board precedent that work rules should not be read in isolation and that they be given a reasonable reading. See, Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) (Board must "refrain from reading particular phrases in isolation"); Tradesmen International, 338 NLRB 460, 462 (2002) ("the judge improperly reads the word positive in isolation").

The ALJ also did not engage in the balancing of employee rights and employer interests required by Boeing. The ALJ's decision is devoid of any analysis balancing the legitimate justifications for the "Confidentiality & Non-Disclosure" and "Media Contact" policies against any potential adverse impact on protected Section 7 rights, as required by Boeing. Instead, the ALJ's decision is littered with empty conclusory catch phrases such as "Section 7 rights certainly tip the scales in their favor" (ALJD at p. 8, lines 31-33) or "the *Boeing* balancing test tips in favor of employees' Section 7 rights" (ALJD at p. 8, lines 13-14). The ALJ's analysis failed to take into account the importance (whether central to the Act or peripheral) of the purported Section 7 activities purportedly impacted by these policies. As to the "Confidentiality & Non-Disclosure" policy, the ALJ refused to accept the legitimate justification for this policy simply because the ALJ believed that there was some confusion as to what information regarding customers and vendors employees could disclose without violating the policy. See ALJD at p. 7, lines 34-35 (". . . the confusion in what employees may not share regarding customers and vendors undermines Respondent's asserted legitimate business justification.") Contrary to the ALJ's conclusion, the

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Board has recognized that a work rule that protects private, proprietary or confidential information serves legitimate business purposes. The Board in Boeing, in fact, upheld the employer's no-camera rule because it helped prevent the disclosure of proprietary information.

As more fully set forth below, LA Specialty's maintenance of the "Confidentiality & Non-Disclosure" and "Media Contact" policies do not violate Section 8(a)(1) under the Board's analysis in Boeing and applicable Board precedent. Accordingly, LA Specialty respectfully requests that the Board's reject the ALJ's findings that LA Specialty violated Section 8(a)(1) and dismiss the Complaint's allegations with respect to the two polices at issue.

QUESTIONS PRESENTED

Whether the ALJ erred in finding that (1) LA Specialty violated Section 8(a)(1) by maintaining the "Confidentiality & Non-Disclosure" policy, and (2) LA Specialty violated Section 8(a)(1) by maintaining the "Media Contact" policy.

FACTUAL SUMMARY
[Exception Nos. 1, 2, 5, 7, 8, 9, 10, 11, 12, 16, 18, 19 and 27]

LA Specialty is a wholesale distributor of produce and other fine and specialty foods whose typical customers are tablecloth restaurants, hotels and specialty grocers. [Tr. 25-26; ALJD at p. 3, lines 5-6.] LA Specialty employs over 800 employees at its corporate office in Santa Fe Springs, California and at locations in Hayward and San Diego, California, Phoenix, Arizona, and Las Vegas, Nevada. [Tr. 26; ALJD at p. 3, lines 6-8.]

At the hearing, no employees of LA Specialty were called by the General Counsel or the Charging Party. The only witnesses who testified at the hearing were Robert Fierro, a trustee of the Charging Party, Teamsters Local 70, and Wesley Wong, LA Specialty's Director of Human Resources and Customer Service who has been employed by LA Specialty since July 1998. [Tr. 16-17, 24-25.]

The General Counsel's Complaint alleged that LA Specialty's maintenance of the "Confidentiality & Non-Disclosure" and "Media Contact" in LA Specialty's Employee Manual violated Section 8(a)(1) because they interfere, restrain or coerce employees in the exercise of their Section 7 rights. [G.C. Exhibit 1(c), ¶ 5; ALJD at p. 5, lines 11-12.] After the hearing, the

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General Counsel moved to withdraw the Complaint's Section 8(a)(1) allegation pertaining to the "Confidentiality & Non-Disclosure." [Cite.] The challenged policies state the following:

> **CONFIDENTIALITY & NON-DISCLOSURE**
>
> *Every employee is responsible for protecting any and all information that is used,* acquired or added to regarding matters that that are confidential and proprietary of LA Specialty Produce including but not limited to client/vendor lists, client/vendor information, accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations, to name a few. Confidential information will also include information provided by a third party and governed by a non-disclosure agreement between LA Specialty Produce and the third party. Access to confidential information should be disclosed on a "need-to-know" basis and must be authorized by management. Any breach to this policy will not be tolerated and will be subject to disciplinary and legal action.

The General Counsel's Complaint alleged that only that the italicized portion violated Section 8(a)(1). [G.C. Exhibit 1(c); ALJD at p. 3, lines 20-36.]

> **MEDIA CONTACT**
>
> Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

[Stipulation, G.C. Exhibit 2.]

The challenged policies were implemented in the 1990's. [Tr. 25; ALJD at p.3. lines 11-13.] When these policies were adopted there was no union organizing, and the policies were not

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adopted in response to any union organizing or Section 7 protected concerted activity. [Tr. 30-31, 32; ALJD at p. 7, lines 7-11.] Moreover, LA Specialty's Human Resources Director, Wesley Wong testified that no employee has ever been disciplined or threatened with discipline for violating these policies. [Tr. 31.] No contrary evidence was presented by the General Counsel.

LA Specialty is in a highly competitive business. [Tr. 26.] The purpose of the "Confidentiality & Non-Disclosure" policy is to protect LA Specialty's customer and vendor lists and customer and vendor information, information that the company considers "confidential and proprietary" and its "trade secrets." [Stipulation, G.C. Exhibit 2; Tr. 29.] All this customer information is on LA Specialty's customer lists. [Tr. 27.] The customer lists contain customer names, addresses, emails, phone numbers, special contact information, customer ordering preferences, pricing and rebates (or special discounts). [Tr. 27, 28.] These lists also contain information as to what customers order whether they be fruits, vegetables, specialty products, or other items. [Tr. 29.] LA Specialty's customer lists have been developed by the company's sales personnel which has expended significant time and resources in their development. [Tr. 27.] Not surprisingly, the customer lists have independent economic value. [Tr. 27-28.] Because LA Specialty is in an extremely competitive business it is vitally important for the Company to maintain the confidentiality of its customer lists so that its competition cannot use the information to outbid or otherwise compete with LA Specialty. [Tr. 29.]

The vendor lists maintained by LA Specialty similarly contain valuable confidential and proprietary information. [Tr. 29.] The vendor lists contain the names of those vendors that supply LA Specialty with the produce and specialty goods and foods. [Tr. 29.] The vendor lists have the names, addresses, emails, contact person information, and the pricing range that LA Specialty pays for a particular product, and the discounts it receives. [Tr. 29.] As with the customer lists, maintaining confidentiality of the vendor lists is vital to LA Specialty's business because customers buy from LA Specialty because of the quality of its products. [Tr. 30.] If the vendor lists are disclosed to the public, LA Specialty's competitors can outbid and lure vendors away from LA Specialty thereby interfering with long-established relationships between LA Specialty and its vendors. [Tr. 30.]

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LA Specialty has adopted the "Confidentiality & Non-Disclosure" policy because it considers its customer and vendor lists to be confidential and proprietary and trade secrets. [Tr. 27.] Under California's Trade Secret Act, LA Specialty is required to have confidentiality policies in place to protect such trade secrets. [Tr. 33-34.]

As Wesley Wong credibly testified, the "Confidentiality & Non-Disclosure" policy does not prevent or preclude employees from disclosing to the Union, the names or locations of customers. [Tr.39, 40-41.] While LA Specialty considers information in its employees' personnel files or payroll records to be confidential and proprietary, nothing in the "Confidentiality & Non-Disclosure" policy prohibits employee from sharing information about their wages with each other. [Tr. 46-47.]

With respect to the "Media Contact" policy, it was adopted because LA Specialty's President, Michael Glick, wanted to make sure that he was the sole and designated person to speak on behalf of LA Specialty. [Tr. 31; ALJD at p. 4, lines 39-41.] The "Media Contact" policy was not adopted in response to any union organizing or protected concerted activity. [Tr. 32; ALJD at p. 8, lines 21-25.] This policy was also not adopted in response to employees speaking to the media or to prohibit employees from speaking to the media about wages, hours and working conditions. [Tr. 32.] In fact, the media policy has never been applied to stop employees from talking to the media about union matters, and no employee has ever been disciplined under the "Media Contact" policy. [Tr. 32.]

Teamsters Local 70 trustee, Robert Fierro, testified that in prior organizing drives he has asked employees to speak to the media. [Tr. 18, 20.] In having employees talk to the media, Fierro conceded that employees are not speaking on behalf of the employer they work for. [Tr. 20-21; ALJD at p. 5, lines 6-7.] LA Specialty's "Media Contact" policy does not prevent Teamsters Local 70 having employees talk to the media because the policy does not prohibit employees from talking to the media about anything employees want to talk about so long as the employees do not purport to speak on behalf of LA Specialty. [Tr. 45-46.]

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LEGAL ARGUMENT
[Exception Nos. 1 -41]

The Administrative Law Judge erred in concluding that LA Specialty's maintenance of the "Confidentiality & Non-Disclosure" and "Media Contact" policies violated Section 8(a)(1).

The evidence conclusively establishes that the challenged policies are facially neutral, because these policies do not explicitly reference or restrict Section 7 conduct. Additionally, these policies were not promulgated in response to NLRA-protected conduct, and the evidence establishes that these policies have not been applied to restrict Section 7 protected conduct.

Until recently, Board precedent dictated that the mere maintenance of facially neutral polices such as the "Confidential & Non-Disclosure" policy and "Media Contact" policy violated Section 8(a)(1), if employees would "reasonably construe" the rule in question to prohibit Section 7 protected conduct. Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004).

The Board rejected the Lutheran Heritage standard in Boeing Company, 365 NLRB No. 154 (2018), and adopted a new standard for testing the validity of work rules and policies such as those at issue in this case. The Boeing Board jettisoned the Lutheran Heritage test because "it [did] not permit any consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." Boeing, supra, slip op. at 7.

Under Boeing, the Board held that it will "no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." Boeing, supra, 365 NLRB No. 154, slip op. at 2. As a result, the Board in Boeing announced that it would evaluate two things when testing the facial validity of work rule language: (i) the nature and extent of the rule's potential impact on NLRA protected conduct, and (ii) an employer's legitimate justification associated with the rule. In announcing this new test, the Boeing Board identified three categories of rules that would likely result from the new balancing test:

• Category 1 will include rules that the Board designates as definitively lawful, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the

exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

• Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

• Category 3 will include rules that the Board will designate as definitively unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. Id., slip op. at 3-4.

Under Boeing's analytical framework LA Specialty's "Confidentiality & Non-Disclosure" policy and "Media Contact" policy are facially neutral policies. Neither policy when reasonably construed explicitly prohibits or restricts NLRA-protected conduct. Moreover, any slight potential adverse impact on protected rights is outweighed by legitimate justification associated with and underlying each policy.

In the case of the "Confidentiality & Non-Disclosure" policy, even the General Counsel conceded that this policy was a Category 1 rule under Boeing and sought to withdraw the Complaint's Section 8(a)(1) violation as to this policy after the close of the hearing and prior to issuance of the Decision by the ALJ. The General Counsel's concession should end the inquiry into the lawfulness of LA Specialty's maintenance of its "Confidentiality & Non-Disclosure" policy requiring dismissal of the Complaint's Section 8(a)(1) allegation as it pertains to this policy.

Furthermore, LA Specialty has a legitimate justification in protecting its confidential and proprietary information which includes its customer and vendor lists. These lists are trade secrets under applicable law and LA Specialty is required to take steps to protect them from disclosure in order to maintain their trade secret status under California's Uniform Trade Secrets Act, Cal. Civil Code §§ 3426, et seq. and The Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836, et seq. Even under Lutheran Heritage, a ban on discussing trade or business secrets or confidential or proprietary information was not considered to affect Section 7 rights unless terms and conditions were specifically included (which LA Specialty's policy does not). Lafayette Park Hotel, 326

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NLRB 824, 826 (1988), *enfd. mem.*, 203 F.3d 53 (D.C. Cir. 1999); Super K-Mart, 330 NLRB 263, 263 (1999). More recently, the Board in Boeing held that the protection of an employer's proprietary information was a legitimate justification for maintenance of a work-related policy. The ALJ's contention that there is purported confusion as to what "employees may not share regarding customers and vendors" (ALJD at p. 7, lines 33-35) does not undermine the legitimate business justification for this policy.

LA Specialty's maintenance of the "Confidentiality & Non-Disclosure" policy is lawful under Boeing because it is facially neutral: it does not explicitly restrict NLRA-protected conduct, there is no evidence that the policy was adopted in response to NLRA-protected conduct, and it has not been applied to restrict NLRA-protected conduct. Moreover, to the extent the policy potentially interferes with employees' Section 7 rights by prohibiting employees from disclosing customer or vendor information to the Union and was understood by employees to prohibit such disclosures, the policy has only a "slight" adverse impact on Section 7 protected conduct. This is so because any impact would be on a peripheral right to use customer or vendor information to assist the Union in conducting a public relations campaign or boycott. See, e.g., Schwan's Home Service, 364 NLRB No. 20, slip op. at 16 (Miscimarra dissenting). Here, the ALJ failed to analyze whether a prohibition against disclosing customer or vendor information was a right that was central to the Act or a peripheral one. Because the ALJ failed to make the requisite analysis, the ALJ erred in striking an incorrect balance under Boeing by finding that the "potential impact on employees' Section 7 rights tips the scale in favor of employee rights" (ALJD at p. 7, lines 37-38) and that the "*Boeing* balancing test tips in favor of employees' Section 7 rights and finding a violation of Section 8(a)(1). [ALJD at p. 8, lines 12-14.]

LA Specialty's maintenance of the "Media Contact" policy likewise does not violate Section 8(a)(1) under Boeing and applicable precedent. As noted above, this policy is facially neutral because it does not explicitly restrict NLRA-protected conduct, there is no evidence that the policy was adopted in response to NLRA-protected conduct, and it has not been applied to restrict NLRA-protected conduct. Moreover, when reasonably construed, it is clear the purpose of the "Media Contact" policy is not to prohibit employees from speaking to the media. Rather,

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its intended and stated purpose is to advise employees that they are not authorized to speak to the media on LA Specialty's behalf and that its President Michael Glick is the only person authorized to do so. This is a legitimate justification for the "Media Contact" policy because employers, like LA Specialty, have a significant interest in making sure that only authorized representatives speak for the company. A policy that prevents employees from speaking on behalf of an employer in response to media inquiries is lawful. See, e.g. Crowne Plaza Hotel, 352 NLRB 382, 386 (2008). The absence of any allegation the "Media Contact" policy has "actually interfered" with Section 7 conduct establishes that the policy poses only a "comparatively slight" risk to employees' Section 7 rights. Boeing, supra at 19. Additionally, the right of employees speaking to the media in connection with a Union's public relations campaign or boycott is a peripheral right under the Act. Given this "comparatively slight" risk to employees' Section 7 rights, the ALJ erred in finding that "employees Section 7 rights certainly tips the scales in their favor." [ALJD at p. 8, lines 32-33.] The ALJ also erred in finding that the "Media Contact rule as written creates a chilling effect on employees when exercising Section 7 rights." [ALJD at p. 9, lines 2-3.] The ALJ made this finding without any factual support. Because the "Media Contact" policy has only a slight impact on employees' Section 7 rights, the ALJ erred in finding that the Board's decision in Boeing supported a Section 8(a)(1) violation as to LA Specialty's maintenance of the "Media Contact" policy.

I. LA SPECIALTY'S MAINTENANCE OF THE "CONFIDENTIALITY & NON-DISCLOSURE" POLICY DOES NOT VIOLATE SECTION 8(a)(1). [Exception Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 22, 23, 24, 28, 30, 31, 32, 34, 35, 36, and 37-41]

LA Specialty's maintenance of the "Confidentiality & Non-Disclosure" policy does not violate Section 8(a)(1) and the ALJ erred in finding a violation.

As the testimony of LA Specialty's Director of Human Resources and Customer Service, Wesley Wong, conclusively established, the "Confidentiality & Non-Disclosure" policy was not adopted in response to union or protected concerted activity and has never been applied to restrict or prohibit such conduct. [Tr. 30-31, 32.] Because it does not explicitly restrict, prohibit or refer to union or Section 7 protected conduct, the "Confidentiality & Non-Disclosure" policy is a

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facially neutral policy.

The General Counsel conceded that this policy does not violate Section 8(a)(1) in making a post-hearing motion to withdraw the Complaint's Section 8(a)(1) allegation as to this policy. The General Counsel agreed with LA Specialty's position that the "Confidentiality & Non-Disclosure" policy was a Category 1 rule under Boeing's analytical framework and its maintenance by LA Specialty was lawful. See Counsel for the General Counsel's Motion to Withdraw Paragraph 4(a) of the Complaint (dated June 27, 2018).

Under the analytical framework of Boeing, LA Specialty's "Confidentiality & Non-Disclosure" is facially neutral because it does not explicitly restrict NLRA-protected conduct, there is no evidence that the policy was adopted in response to NLRA-protected conduct, and it has not been applied to restrict NLRA-protected conduct. As a facially neutral policy, the "Confidentiality & Non-Disclosure" is a Category 1 rule under the Board's Boeing analytical framework. Category 1 rules are: "(a) rules that are lawful because, when reasonably interpreted they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules." Boeing, supra, 365 NLRB No. 154, slip. op. at 4. As a Category 1 rule, the "Confidentiality & Non-Disclosure" policy is lawful because (i) the policy, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Boeing, supra, 365 NLRB No. 154, slip op. at 3.

A. The "Confidentiality & Non-Disclosure" policy does not prohibit or interfere with the exercise of NLRA rights.

Here, the evidence conclusively established that the "Confidentiality & Non-Disclosure" policy does not prohibit or interfere with the exercise of Section 7 protected conduct. To the extent employees are engaged in Section 7 protected activity by disclosing customer or vendor names or addresses to their union or other employees, the policy does not prohibit employees

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from disclosing such information for customers or vendors serviced by the employees. The policy also does not prohibit employees from disclosing information concerning their wages, terms and conditions to the Union or sharing such information among themselves. Additionally, there is no evidence that any employee has been disciplined for violating the "Confidentiality & Non-Disclosure" policy. Likewise, there is no evidence that the policy has deterred employees from engaging in protected Section 7 conduct by disclosing information regarding their wages, hours, and other terms and conditions of employment to the Union or any other employee. Moreover, the Union has alternative means for obtaining the names and addresses of LA Specialty's customers and vendors. The Union can follow the Company's drivers on their deliveries to find out such information about the Company's customers. The Union can also have representatives outside of LA Specialty's facility to identify who are the Company's customers. Likewise, the Union can ask LA Specialty's employees for the names of the Company's customers and vendors.[2]

Contrary to the record evidence, the ALJ found that the "Confidentiality & Non-Disclosure" policy prohibited employees from sharing customer and vendor names with third parties such as a labor organization." [ALJD at p. 7, lines 38-40.] The ALJ made this finding despite acknowledging that there was no evidence that this policy "'actually interfered' with employees' Section 7 rights." [ALJD at p. 8, lines 4-6.] Inexplicably, the ALJ failed to consider this lack of evidence because there was also no evidence that LA Specialty suffered any "economic harm" from employees violating this policy. [ALJD at p. 8, lines 6-9.] The lack of evidence of "economic harm" misses the point. The lack of evidence of "economic harm" does not establish that employees understood the policy as prohibiting the disclosure of customer and vendor information. However, the absence of any evidence that LA Specialty's "Confidentiality & Non-Disclosure" policy has actually interfered with any Section 7 conduct is significant. It is significant because it is evidence that employees did not understand the policy to prohibit the

[2] Union representative Richard Fierro testified that LA Specialty's employees do not know the identities of all the customers. [Tr. 21-23; ALJD at p. 4, lines 28-29.] Obviously, Mr. Fierro's testimony on this point was not accurate since LA Specialty's employees know the identities of all of the company's customers because they are the ones making deliveries to these customers.

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disclosure of customer and vendor information. Importantly, Board precedent establishes that a policy's broad ban on discussing trade secrets, business secrets, confidential or proprietary information does not affect Section 7 rights rendering the policy unlawful unless the policy prohibited discussing or disclosing terms and conditions of employment . See, e.g., Lafayette Park Hotel, supra, 326 NLRB at 826; Super K-Mart, 330 NLRB 263, 264 (1999) ("... employees reasonably would understand from the language of the Respondent's confidentiality provision that it is designed to protect the Respondent's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions. The fact that the Respondent's confidentiality provision has not been enforced to prohibit employees from discussing their terms and conditions of employment would reinforce this understanding." (Emphasis added.)) Moreover, because LA Specialty's customer or vendor relationships are not subject to bargaining, employees would not understand that the "Confidentiality & Non-Disclosure" policy prohibits the disclosure of customer and vendor information in connection with legitimate public relations campaigns or boycotts conducted by employees or a union. See Memorandum GC 18-04. Guidance on Handbook Rules Post-*Boeing* (June 6, 2018), at p. 10 n. 32 citing Schwan's Home Service, 364 NLRB No. 20, slip op. at 16 (Miscimarra dissenting).

B. The impact of the "Confidentiality & Non-Disclosure" policy on NLRA-protected activity is "comparatively slight".

The ALJ found that LA Specialty's "Confidentiality & Non-Disclosure" policy prohibited employees from engaging in Section 7 conduct by disclosing customer or vendor names to the Union. [ALJD at p. 7, lines 38-40.] Based on the purported interference with such Section 7 conduct, the ALJ found that Boeing's balancing test compelled a finding of a Section 8(a)(1) violation. [ALJD at p. 8, lines 12-14 ("The rule, as written, with specific reference to "customer/vendor lists" is vague and ambiguous, and the *Boeing* balancing test tips in favor of employees' Section 7 rights. Accordingly, the rule violates Section 8(a)(1) of the Act.")].

In making this Section 8(a)(1) finding, the ALJ completely ignored the Board's mandate that any potential impact on employees' Section 7 rights must take into account whether such

rights were central to or peripheral to the Act. By finding a Section 8(a)(1) violation, the ALJ failed to acknowledge that employees' rights to disclose customer or vendor information to the Union in support of the Union's economic campaign or boycott concern rights that are peripheral to the Act.

Here, there is absolutely no evidence or even an allegation that the policy has "actually interfered" with any Section 7 conduct. Any potential interference with employees' Section 7 rights to disclose customer or vendor information is "comparatively slight." Boeing, supra, 365 NLRB No. 154, slip. op. at 19. (impact of no-camera rule is "comparatively slight" where there is no allegation that the rule has "actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity."); see also K-Mart, 330 NLRB 263 (1999) ("... employees reasonably would understand from the language of the Respondent's confidentiality provision that it is designed to protect the Respondent's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions. The fact that the Respondent's confidentiality provision has not been enforced to prohibit employees from discussing their terms and conditions of employment would reinforce this understanding." (Emphasis added.))

C. LA Specialty has a legitimate justification for its "Confidentiality & Non-Disclosure" policy.

The evidence conclusively establishes that LA Specialty has a legitimate justification for maintaining its "Confidentiality & Non-Disclosure" policy. Its customer and vendor lists contain information regarding its customers and vendors that have been accumulated over a substantial period of time, and that are confidential and proprietary to LA Specialty. In addition to names and addresses, the customer lists include customer emails, phone numbers, special contact information, customer ordering preferences, pricing and rebates (or special discounts). [Tr. 27, 28.] The vendor lists, in addition to having the names and addresses of LA Specialty's vendors, also contain contact person information, the pricing range that LA Specialty pays for a particular

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product, and the discounts it receives. [Tr. 29.]

Because LA Specialty is in a highly competitive business, as Wesley Wong testified, the customer and vendor lists are valuable proprietary records of the business that have been developed over time through the efforts of the Company and its sales employees. [Tr. 27.] These lists contain customer and vendor contact information and history that are important in LA Specialty maintaining relationships and goodwill with its customers and vendors. The customer and vendors lists contain confidential financial information about LA Specialty's customers and vendors, and reflect current and historical pricing and purchasing information for each customer and vendor that are not public information and that provide LA Specialty a substantial economic/business advantage in the wholesale produce and specialty food products marketplace. [Tr. 27-29.] Obtaining the customer and vendor lists would enable competitors to more selectively and effectively solicit LA Specialty's customers and vendors. LA Specialty's business would be harmed because competitors would be able to disrupt the long-standing relationships existing between LA Specialty and its customers and vendors. In this regard, competitors would be able to underbid LA Specialty and lure customers away with the information contained in its customer lists. [Tr. 29.] Similarly, competitors would be able to outbid LA Specialty for the produce and specialty products it obtains from its vendors with the information contained in the vendor lists. [Tr. 30.]

LA Specialty's customer and vendor lists are trade secrets. The lists are compilations of information developed by LA Specialty over a substantial period of time. The information contained in the customer and vendor lists is not generally known in the industry. Moreover, the customer and vendor lists have economic value because they provide LA Specialty with a business advantage. See, e.g., Klamath-Orleans Lumber, Inc. v. Miller, 87 Cal.App.3d 458, 465 (1978) (customer list has economic value and is a trade secret if it provides a business with a "substantial business advantage). Under applicable law, LA Specialty's customer and vendor lists are trade secrets. See, e.g., Morlife, Inc. v. Perry, 56 Cal.App.4th 1514 (1997) (customer list held to be a trade secret where it has independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or

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use). The ALJ's observation that LA Specialty proffered no evidence of "economic harm" (ALJD at p. 4, line 20) is irrelevant. The fact that no evidence of "economic harm" was provided does not imply that LA Specialty's customer and vendor lists do not have independent economic value.

An employer, like LA Specialty, has a lawful right to protect its trade secrets under California's Uniform Trade Secrets Act, California Civil Code §§ 3426, et seq., and The Defend Trade Secrets Act of 2016, 18 U.S.C. § 1836, et seq.[3] Applicable law requires that an employer, like LA Specialty, take reasonable steps to protect its trade secrets from disclosure. An employer takes such reasonable steps to protect its trade secrets - its customer information - by including confidentiality provisions in employee contracts and employee handbooks. Morlife, supra, 56 Cal.App.4th at 1523 (1997) (employer took reasonable steps to protect its trade secret information because its employee handbook expressly stated that "employees shall not use or disclosure [the company's] secrets or confidential information … including 'lists of present and future customers'").

The ALJ simply ignored any evidence proffered by LA Specialty to support its legitimate justification for the "Confidentiality & Non-Disclosure" policy. The ALJ rejected LA Specialty's interest in protecting its customer and vendor lists as trade secrets because "[Wesley] Wong did not know whether Respondent was required to maintain such a rule" by the California Uniform

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[3] California's Uniform Trade Secrets Act defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." California Civil Code §3426.

The Defend Trade Secrets Act of 2016 defines a trade secret as "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." 18 U.S.C. §1839.

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Trade Secrets Act. [ALJD at p. 7, lines 29-33.] In fact, Wesley Wong testified that while he was not fully versed in all the legal technicalities, California's trade secrets act required a company to have confidentiality policies in place to protect their trade secrets. [Tr. 34 ("Q: And, do you know whether or not companies have to have confidentiality policies in order to protect their trade secrets? A: I'm not clear on that, but I will say yes.")] Irrespective of Mr. Wong's legal knowledge, the California's Uniform Trade Secrets Act defines a trade secret as "information" that has independent economic value and that "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." California Civil Code §3426. Obviously, implementation of a "Confidentiality & Non-Disclosure" constitutes reasonable efforts by an employer to maintain the secrecy of the Company's trade secrets.

It is well-established under Board precedent that employers, like LA Specialty, have a legitimate business justification for protecting customer and vendor information. See, e.g., Schwan's Home Service, 364 NLRB No. 20, slip op. at 16 (employers have a compelling interest in prohibiting the disclosure of customer information) (Miscimarra dissenting). This compelling business justification outweighs the marginal impact on Section 7 rights.

Based on the foregoing, the ALJ erred in rejecting that LA Specialty had a legitimate business justification for its "Confidentiality & Non-Disclosure" policy.

D. The ALJ erred in applying the Boeing balancing test in finding a violation of Section 8(a)(1) based on LA Specialty maintaining its "Confidentiality & Non-Disclosure" policy.

In finding a violation of Section 8(a)(1) in connection with the "Confidentiality & Non-Disclosure" policy, the ALJ purported to apply the Boeing balancing test. However, any actual analysis by the ALJ in applying this test is sorely missing. In fact, the ALJ's finding that the "*Boeing* balancing test tips in favor of employees' Section 7 rights" (ALJD at p. 8, lines 12-14) is devoid of any ratiocination by the ALJ. Because the ALJ's conclusion lacks sound reasoning, the ALJ erred in finding that employees' Section 7 rights trumped LA Specialty legitimate business justifications for maintaining the "Confidentiality & Non-Disclosure" policy.

The ALJ's fundamental error was that she utilized the rejected "reasonably construed" test

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of Lutheran-Heritage. The ALJ's thought process, such as it was, mistakenly focused on purported textual ambiguity which enabled the ALJ to conclude that the policies impacted employees' Section 7 activities and were unlawful. The ALJ concluded that the "Confidentiality & Non-Disclosure" policy was vague and ambiguous, lacked clarity, and engendered confusion. [ALJD 7, lines 13-15, 29-30, 33-35.] By finding a violation on this basis, the ALJ ignored Boeing's rejection of using Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), to invalidate "facially neutral work rules solely because they were ambiguous in some respect." Boeing, supra, 365 NLRB No. 154, slip op. at 2. Likewise, the ALJ ignored the Board's admonition in Boeing not to decide the legality of rules as if the ALJ was the objective employee. Boeing, supra, 365 NLRB No. 154, slip op. at 16 n. 80.

Here, any potential impact on Section 7 rights is slight and such right is a peripheral one under the Act. In contrast, LA Specialty has a compelling justification for protecting its customer and vendor information. Accordingly, the Boeing balancing test dictates a finding that LA Specialty's maintenance of its "Confidentiality & Non-Disclosure" policy does not violate Section 8(a)(1). See, e.g., See Schwan's Home Service, supra, 364 NLRB No. 20, slip op. at 16 ("Respondent clearly has the right to protect its trade secrets and proprietary information from disclosure, and work requirements reasonably calculated to provide such protection would typically be supported by justifications that outweigh any incidental adverse impact on potential Section 7 activity.") (Miscimarra dissenting). Here, as in Boeing, any slight impact on Section 7 protected conduct is far outweighed by the legitimate and substantial justification of the "Confidentiality & Non-Disclosure" policy. As noted by the Board in Boeing, if LA Specialty in the future applies its rule to improperly infringe on Section 7 protected activity, the Board can take action at that time.

E. The ALJ's finding of a violation as to LA Specialty's maintenance of its "Confidentiality & Non-Disclosure" policy infringes LA Specialty's rights under California and Federal law.

California's Uniform Trade Secrets Act and the federal Defend Trade Secrets Act of 2016 provide legal recourse for companies, like LA Specialty to prevent the unauthorized disclosure of

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proprietary information. A finding that LA Specialty's maintenance of its "Confidentiality & Non-Disclosure" policy violates Section 8(a)(1) would infringe on LA Specialty's rights under California's Uniform Trade Secrets Act and the federal Defend Trade Secrets Act of 2016 to protect its trade secrets. Such a finding would directly conflict with the latter federal statute. In this regard, the "Board must be and is mindful of any conflicts between the terms or policies of the Act and those of other federal statutes. ...Where a possible conflict exists, the Board is required, when possible, to undertake a 'careful accommodation' of the two statutes." D.R. Horton, 357 NLRB 2277, 2284 (2012). The ALJ's Decision failed to undertake this statutory accommodation and, accordingly, the ALJ's Section 8(a)(1) finding should be rejected.

Here, a holding that the "Confidentiality & Non-Disclosure" policy violates Section 8(a)(1) would undermine the objective of the federal Defend Trade Secrets Act of 2016 which is to protect a business's secrets. Such a finding would be contrary to the Board's statutory duty to accommodate and to avoid undermining other Federal laws. As Board Member Miscimarra stated, citing Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), in Murphy Oil, USA, Inc., 361 NLRB 774 (2014):

> [T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

An administrative agency "must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute." New York Shipping Assn. v. Federal Maritime Commission, 854 F.2d 1338, 1367 (D.C. Cir. 1988), cert. denied 488 U.S. 1041 (1989). The ALJ could not, as the Board cannot, adopt an interpretation "announcing, in effect, that the NLRA trumps all other Federal statutes." Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1501 (2000), supplemented 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003). The ALJ's finding that the "Confidentiality & Non-Disclosure" policy violates Section 8(a)(1) violates these important principles requiring the harmonization of Federal statutes.

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II. THE ALJ ERRED IN FINDING THAT LA SPECIALTY VIOLATED SECTION 8(a)(1) BY ITS MAINTENANCE OF THE "MEDIA CONTACT" POLICY. [Exception Nos. 3, 4, 16, 17, 18, 19, 20, 21, 25, 26, 27, 29, 30, 31, 33, 34, 35, and 36-41]

Contrary to the ALJ's conclusion, LA Specialty's maintenance of the "Media Contact" policy does not violate Section 8(a)(1). Like the "Confidentiality & Non-Disclosure" policy, when reasonably construed, the "Media Contact" policy is a facially neutral policy and a Category 1 rule under Boeing's analytical framework. It does not impact employees' Section 7 protected conduct because it does not prohibit employees from talking to the media. The policy simply prohibits employees from speaking to the media on behalf of LA Specialty. Preventing employees from talking to the media on the Company's behalf is a legitimate justification for the "Media Contact" policy. Moreover, where there is no evidence or any allegation that the "Media Contact" policy has "actually interfered" with Section 7 conduct the policy poses only a "comparatively slight" risk to employees' Section 7 rights. Boeing, supra, slip. op. at 19. This "comparatively slight" risk to employees' Section 7 rights and LA Specialty's justification for its "Media Contact," compels a finding that maintenance of the policy is lawful, and that the ALJ erred in finding a Section 8(a)(1) violation.

Employers may lawfully control who makes official statements to the media on behalf of the company. See Memorandum GC 15-04, Report of the General Counsel Concerning Employer Rules (March 18, 2015), at 12; Memorandum GC 18-04. Guidance on Handbook Rules Post-*Boeing* (June 6, 2018), at p. 14.

Here, when the "Media Contact" policy is read as a whole, it is clear that the language of the policy and its intent is not to restrict or prohibit employees from talking to the media on their own or on behalf of other employees. LA Specialty's Director of Human Resources Wesley Wong testified regarding the "Media Contact" policy, and his testimony was not contradicted by any other witness. Mr. Wong credibly testified that the policy was not intended to prohibit employees from talking to the media on their own behalf and has never been applied to so restrict employees. Mr. Wong's testimony and the language of the policy establish that it is not intended to prohibit employees from talking to the media.

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The ALJ disregarded Mr. Wong's testimony and the plain language of the "Media Contact" in finding a violation of Section 8(a)(1). The ALJ erred in doing so. The ALJ erred because the ALJ ignored Board precedent as to her obligations in construing a workplace policy or rule. The Board has cautioned that a challenged rule must be given a reasonable reading, that particular phrases cannot be read in isolation, and that an employer's rules must be read in their totality and in context. See, Lutheran Heritage, supra, 343 NLRB at 646 ("In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights."); Tradesmen International, 338 NLRB 460, 462 (2002) ("the judge improperly reads the word "positive" in isolation. The Board has declined to parse the language of employers' rules in this manner.")

In the Decision, the ALJ erroneously found that the "Media Contact" policy "as read precludes employees from speaking to the media on any subjects regarding Respondent." [ALJD at p. 8, lines 30-31.] The ALJ mistakenly focused on certain language in isolation. The ALJ misinterpreted the first sentence of the policy as precluding employees from talking to the media. The first sentence of the policy states that "Employees approached for interview and/or comments by the news media, cannot provide them with any information." (Emphasis added.) This sentence cannot reasonably be read to prohibit employees from approaching or talking to the media on their own behalf, and under Board precedent cannot be read in isolation as the ALJ apparently did. The intent, purpose and scope of the "Media Contact" policy is fully explained by the very next sentence that states that "Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization." (Emphasis added.)

In reading the "Media Contact" policy as precluding employees from talking to the media about the Company, the ALJ relied on the rejected Lutheran Heritage analysis of workplace rules. The ALJ construed the "Media Contact" rule as if the ALJ was the "objective employee" focused only on potential interference with employees' Section 7 rights. Such an analysis was rejected by the Board in Boeing. 365 NLRB No. 154, slip op. at 16 n.80 ("*Lutheran Heritage* failed to

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provide an adequate definition of this objective employee, thus permitting Board members in subsequent decision to decide the legality of rules as if *they* were the objective employee, focused only potential interference with Sec. 7 rights.")

The ALJ failed to engage in any meaningful thought process in applying Boeing's balancing test. Instead, the ALJ relied on the ALJ's knee jerk assertion that, "[t]he Media Contact rule as written creates a chilling effect on employees when exercising Section 7 rights." [ALJD at p. 9, lines 2-3.] However, there is no record evidence of any "chilling effect." The record established that no employee has ever complained that this policy has prevented him or her from engaging in any group or protected concerted activity. [Tr. 34, lines 11-14.] Moreover, in pretending to apply Boeing's balancing test, the ALJ without any adequate rationale simply concluded that, "[w]hile it is certainly a legitimate business reason for Respondent to designate whom it wants to speak on its behalf, employees' Section 7 rights certainly tip the scales in their favor." [ALJD at p. 8, lines 31-33.] The ALJ misapplied Boeing's balancing test in finding that LA Specialty violated Section 8(a)(1) in maintaining the "Media Contact" policy.

A correct application of Boeing's balancing test in balancing employees' Section 7 rights and LA Specialty's legitimate interests in the "Media Contact" policy compels a finding that the Company did not violate Section 8(a)(1).

Here, the "Media Contact" policy protects LA Specialty from unauthorized statements being made to the media on behalf of the Company. The purpose of the policy is to prevent employees from speaking on behalf of LA Specialty when they have not been so authorized. It is akin to an agency rule designed to protect LA Specialty from employee acting as its agents when they have not been authorized to do so. Nothing in the policy prohibits employees from speaking to the media about the Company or their terms and conditions of employment to the media. The Board has never held that employees have a Section 7 protected right to speak for their employer as an agent. See Paraxel International LLC, 356 NLRB No. 82, slip. op. at 11-12 (2011) (Board held lawful a rule that required employees to refer inquiries about the employer to authorized spokespersons).

Against LA Specialty's legitimate interests and justification for the "Media Contact"

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policy must be weighed against any potential impact on employees' Section 7 rights. Here, employees' Section 7 rights to speak to the media impacts rights that are peripheral to the central purpose of the Act. Moreover, there is no evidence or allegation that the "Media Contact" policy has "actually interfered" with employees' Section 7 rights in talking to the media even though this policy has been in existence for over 20 years. The ALJ overlooked this critical fact [ALJD at p. 9, lines 6-7] with faulty reasoning that "the General Counsel need not prove actual harm to employees as argued by Respondent". The ALJ clearly missed the importance of the fact that the policy had not interfered with any protected activity in 20 years, and in doing so, ignored Boeing. Under the Board's analysis in Boeing, the lack of evidence of actual interference with employees' Section 7 rights compels a finding that the "Media Contact" policy poses only a "comparatively slight" risk to employees' Section 7 rights. Boeing, supra, 365 NLRB No. 154, slip op. at 19 ("[T]he adverse impact of Boeing's no-camera rule on NLRA-protected activity is comparatively slight. . . .there is no allegation that Boeing's no-camera rule has actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity.")]

Because any purported adverse impact of LA Specialty's "Media Contact" policy is comparatively slight and is outweighed by legitimate and substantial justifications associated with the policy, LA Specialty's maintenance of the policy does not violate Section 8(a)(1). Boeing, supra, 365 NLRB No. 154, slip op. at 19 (Because Boeing's no-camera rule adverse impact on the exercise of Section 7 rights was comparatively slight and outweighed by substantial and important justifications associated with the rule, maintenance of no-camera rule did not violate Section 8(a)(1).]

Based on the foregoing, the ALJ erred in finding a violation of Section 8(a)(1) based on LA Specialty maintaining its "Media Contact" policy. As a result, the ALJ's finding, recommended remedy and order, and notice to employees based on such finding should be rejected by the Board.

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CONCLUSION

On the basis of the foregoing, LA Specialty respectfully requests that the Board sustain its Exceptions to the ALJ's Decision, vacate the ALJ's decision, and the ALJ's findings, conclusions of law, and dismiss the General Counsel's Complaint in its entirety.

DATED: August 9, 2018

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 300 South Grand Avenue, 37th Floor, Los Angeles, California 90071-3147.

I hereby certify that on August 9, 2018, I caused the foregoing document described as **BRIEF OF RESPONDENT L.A. SPECIALTY PRODUCE CO. IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 32-CA-207919 to be filed via E-Filing.

I hereby also certify that on August 9, 2018, I electronically mailed a copy of the foregoing document and caused a true copy thereof to be placed in a sealed envelope with postage thereon fully pre-paid and addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 9, 2018, at Los Angeles, California.

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